Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-738

RICHARD J. STULL,

Petitioner,

-against-

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually, and as Executors of the Estate of WILLIAM T. PIPER, Deceased, NICHOLAS H. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually, and as Executors of the Estate of WILLIAM T. PIPER, Deceased, NICHOLAS H. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Richard J. Stull prays that a Writ of Certiorari issue to review a judgment entered by the United States Court of Appeals for the Second Circuit on

August 26, 1977. A petition for rehearing or rehearing en banc was denied on October 14, 1977.

The Court of Appeals affirmed a judgment of the United States District Court for the Southern District of New York which dismissed plaintiff's complaint on the ground that the statute of limitations had expired prior to the commencement of this action.

OPINIONS BELOW

The opinion of the District Court is printed as Appendix A hereto and is reported at 424 F. Supp. 937.

The opinion of the Court of Appeals in this case is printed as Appendix B hereto and is reported at 561 F.2d 429.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 26, 1977. Petitioner sought rehearing or rehearing en banc below, which was denied on October 14, 1977. The jurisdiction of this Court to issue a Writ of Certiorari to the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented herein are of broad interest and importance which need resolution. They involve application of this Court's decision in American Pipe v. Utah, 414 U.S. 538 (1974). Several courts have decided the application of American Pipe in conflicting manner.

In addition, this case involves a question never previously considered by any court: when does a cause of action

for violation of the Williams Act, 15 U.S.C. § 78n(e) accrue for the purpose of the statute of limitations? The questions are:

1. When an action is denied class status because of the disqualification of the purported class representative, does the tolling of the statute of limitations as enunciated under American Pipe enable another member of the putative class to bring a separate class action?

2. When does a cause of action for violation of the Williams Act accrue for determining when the statute of limitations commences to run?

STATUTES INVOLVED

The statutes involved are Rule 23 of the Federal Rules of Civil Procedure, 15 U.S.C. § 78n(e) (The Williams Act) and Sections 203(f) and 213(8) of

the New York Civil Practice Law and Rules, which are printed in pertinent and relevant part as Appendix C hereto.

STATEMENT OF THE CASE

Introduction

This action had its genesis in the Chris-Craft-Bangor Punta ("Bangor") takeover attempts to capture control of Piper Aircraft ("P.C." hereinafter). The ensuing litigation between Chris-Craft and Bangor, as well as the SEC, spawned by these attempts are reported in 303 F.Supp. 191, aff'd. 426 F.2d 569; 331 F.Supp. 1154; 337 F.Supp. 1128; 480 F.2d 341; 384 F.Supp. 507; 516 F.2d 372; ___ U.S. ___, 97 S.Ct. 926 (Opinion of this Court, February 23, 1977).

This Court ultimately decided that Chris-Craft lacked standing to seek relief under Section 14(e) and the sole parties who had standing to invoke the

Williams Act were the shareholders of the target company - such as petitioner.

For the purpose of this petition there can be no dispute as to the facts of this litigation. They were found in extensive detail by the United States Court of Appeals (480 F.2d 341 and 516 F.2d 172) and not disturbed by this Court or in any subsequent proceeding. Respondents did not contest them below.

These facts show that respondents wrongfully interfered with the Chris-Craft tender offer and fraudulently violated Section (e) of the Williams Act (15 U.S.C. 78n(e)).

As a result of the wrongful activity, the balance of P.C.'s stock, i.e. those not tendered - 14.9% - remained in the hands of the public (including petitioner).

The Litigation History

Petitioner's wife, Lillian Stull,

commenced in the United States District Court for the Southern District of New York, two litigations involving the Chris-Craft-Bangor Punta tender offers. In 1969, she started a stockholder's derivative action on behalf of P.C. attacking the Chris-Craft tender offer of $65 per share, claiming that that amount was less than the fair value and constituted a raid on P.C. That action was entitled Stull v. Green, 69 Civ. 440.

In 1972, Mrs. Stull commenced a purported class action on behalf of the present P.C. shareholders claiming that that class was deprived of Chris-Craft's tender and exchange offers by virtue of the false and misleading communications made to such shareholders by respondents. That action was entitled Stull v. Pool, 72 Civ. 2055.

Petitioner, a shareholder of P.C., was a member of the putative class

described in the second Stull action. He was also an attorney and a member of the firm of Stull & Stull, who represented Mrs. Stull in the aforesaid two litigations.

The District Court (Judge Owen) denied class status to Stull v. Pool in an Opinion dated April 30, 1974 (63 F.R.D. 702). The Court assumed that the action "is an appropriate one for class treatment...." but concluded that Mrs. Stull would be an inadequate representative because, inter alia, of her husband's firm acting as her attorneys in the action.

Immediately thereafter, petitioner's firm withdrew as counsel for Mrs. Stull and the New York City law firm of Milberg & Weiss was substituted as her attorneys. That firm appealed Judge Owen's denial of class status to the Court of Appeals and simultaneously renewed the motion for class determination

in the District Court. The District Court denied that renewal without prejudice until the appeal could be disposed of. Thereafter, the appeal was dismissed by the Court of Appeals.

Both of Mrs. Stull's actions were consolidated and transferred to Judge Wyatt of the District Court. The parties thereafter under the direction of Milberg & Weiss commenced settlement discussions.

Respondents attempted to include petitioner in those settlement discussions in order to obtain his release of any claims that he might have against them. Petitioner refused to participate in those discussions, expressly informing respondents and the Magistrate to whom Judge Wyatt had assigned the case, that he would not release these claims and that he planned to institute a new action on behalf of the class.

Thereafter, petitioner commenced

this action on August 1, 1975, alleging that as a result of the various illegal activities of the respondents, he and the class were deprived of the Chris-Craft tender offer. In that action, he was represented by counsel other than his firm.

That action was brought prior to the settlement of Mrs. Stull's two actions. Indeed, a stipulation of settlement of Mrs. Stull's derivative action was filed and an order of the Court was entered on February 11, 1976, directing notice to be sent and a hearing to be held on March 26, 1976. (The derivative suit was settled on the basis that P.C. would litigate the claims in a separate action in Pennsylvania, thereby removing the need for the derivative suit.) Thus, this stipulation and order was filed approximately six and one-half months after petitioner's action had been commenced and was being actively litigated. The District Court approved the settlement on

March 26, 1976 and at that same time, Mrs. Stull settled the other action that she had brought which had been denied class status.

In this action, petitioner moved on or about September 12, 1975 for class determination and for partial summary judgment on the grounds of res judicata. The motion was denied without prejudice to renewal after the parties had completed discovery. Petitioner renewed the motion on or about August 24, 1976. Respondents secured several adjournments of the motion and, on or about November 30, 1976, they cross-moved for summary judgment dismissing the complaint. The District Court (Judge Wyatt to whom this action had been assigned) refused to permit petitioner any extensions or adjournments but allowed him approximately three days to respond to the cross-motion. It limited the issue to be decided solely to the question of the

statute of limitations. It did not hold any evidentiary hearings. Thereafter, it summarily dismissed the action upon the grounds that the New York statute of limitations (CPLR 203(f) and 213(8)) had expired prior to the commencement of the suit, and denied petitioner's motions as moot.

REASONS FOR GRANTING THE PETITION

I

THE DOCTRINE OF TOLLING THE STATUTE OF LIMITATIONS ENUNCIATED IN AMERICAN PIPE SHOULD BENEFIT THOSE MEMBERS OF THE PUTATIVE CLASS WHO COMMENCE A SEPARATE ACTION

Both the District Court and the Court of Appeals found that the tolling provisions of American Pipe were limited solely to those who made timely motions to intervene in the action which had been

denied class status.* Thus, the District Court held:

> "... in my view a member of a class on whose behalf a class action has been commenced, may not bring a separate independent action after his individual claim has been time barred. His sole remedy, under American Pipe, is a timely motion to intervene in the class action after class action status has been denied; only if he does so, is the statute of limitations tolled as to him." (Appendix A, p. 942 of 424 F.Supp.)

The Court of Appeals affirmed this holding of the District Court, stating:

> "'[T]he rule of American Pipe was intended for the benefit of purported members of the class who sought to intervene in the action after class status was denied.' Arnell v. Ramsey, supra, 550 F.2d at 783." (Appendix B, p. 433 of 561 F.2d)

We submit that these rulings

*If the tolling provisions of American Pipe applied, petitioner would be timely in his suit since Stull v. Pool had been pending as a class suit for almost two years before denial of class status.

conflict with American Pipe, as well as with holdings of other courts on similar questions. If not reviewed and reversed, the judgment herein will have a "chilling" effect on class actions and Rule 23.

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S.Ct. 2140, 2152 (1974) (Eisen IV), Mr. Justice Powell, writing for the Court, held that American Pipe would not be limited solely to an intervention situation. There, in dealing with notice to a nationwide class, and in responding to the claim that members would not opt out of the nationwide class because the statute of limitations had expired on their individual claims, he stated in Footnote 13:

> "Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414

> U.S. 238, 94 S.Ct. 756, 38 L.Ed. 2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class."* (Emphasis supplied)

In the concurring opinion, Mr. Justice Douglas supported this broader reading of American Pipe, see pages 181 and 182 of 417 U.S.

The meaning of American Pipe and Eisen IV was made clear by Mr. Justice Powell writing for the dissenters in United Airlines, Inc. v. McDonald, ___ U.S. ___, 97 S.Ct. 2464, 2474 (June 20, 1977). He stated therein:

> "Under American Pipe, the filing of a class action complaint tolls the statute of limitations until the District Court makes a decision regarding class status. If class status is denied in whole or in part, the statute of limitations begins to run again as

*The District Court could not reconcile this Footnote, calling it "a puzzling Footnote" which "...might suggest a broader reading of the effect of American Pipe...." (424 F. Supp. at page 943).

> to class members excluded from the class. In order to protect their rights, such individuals must seek to intervene in the individual action (or possibly file an action of their own) before the time remaining in the limitations period expires...."

Thus, Mr. Justice Powell made clear that the benefits of American Pipe were intended to cover those who would commence a separate action. The judgment herein is directly contrary to that intention.

In the period following this Court's decision in American Pipe, other courts have not limited the doctrine enunciated therein to intervention alone. See Hellerstein v. Mather, 360 F.Supp. 473, 474-5 (D. Colo. 1973) (decided prior to this Court's decision in American Pipe but which relied upon the 9th Circuit decision therein, 473 F.2d 590, which was affirmed by this Court); In Re Master Key Antitrust Litigation, 70 F.R.D. 29 (D. Conn. 1976);

Agostine v. Sidcon Corporation, 69 F.R.D. 437, 448, Note 13 (E.D. Pa. 1975). Cf. Katz v. Carte Blanche Corporation, 496 F.2d 747, 761 (3rd Cir. 1974).

Logic and common sense dictate that the tolling doctrine of American Pipe must allow separate suits to be commenced rather than to apply only to situations dealing with timely intervention. Any other conclusion would have dire consequences for class members.

For example, when a court certifies a class and members thereof opt out, and the certification has taken place after the statute of limitations has expired and if American Pipe is to be read as having benefits only for those who intervened in a suit which has been denied class status, those who opt out will have their claims time barred. Mr. Justice Powell makes clear in Eisen IV, supra, that this result was not intended.

Similarly, if a Court certifies a class which is smaller in dimension than that alleged by the plaintiff, what is to happen to the "excluded class members" if the limitations period has expired?

Similarly, to permit American Pipe benefits to be extended only to intervention would mean, once class status is denied, intervention applications from hundreds and hundreds of putative class members all seeking to join the individual suit. The attendant difficulties of a litigation having hundreds of parties plaintiffs - presumably each with separate counsel - would make management problems so difficult as to insure that the case could not progress.*

---

*At bar, there is even further difficulty in that neither Judge Owen nor Judge Wyatt below directed notice to the members of the putative class of the denial. Thus, the putative members have not been told that they should intervene and their claims may now be barred.

It may also be noted that intervention is permissive, requiring the Court's approval. If the Court should choose not to approve, then the intervenor would be "time barred" without an opportunity to redress his wrong.

At bar, there is further reason not to limit American Pipe to intervention alone. Class status had been previously denied for no infirmity on the merits of class suit but rather due to the disqualification of the purported class representative. Petitioner wished to commence a class action. To envision intervention for a putative class action in a suit presenting individual claims is to carry imagination too far. The two litigations are procedurally inconsistent and present management difficulties.

Moreover, Mrs. Stull was settling her private action. How could petitioner intervene with his proposed class action

in a private suit then in the throes of being settled? If the settlement continued, what would the status of the intervenor be? Who would control the litigation?

In short, intervention was not realistic and the tolling doctrine of American Pipe must include the right to bring a separate action.

Permitting the benefits of American Pipe to extend to the separate action commenced by appellant would do no violence to the policy requirements of tolling the statute of limitations described in American Pipe (414 U.S. at 534-5).

The rationale of American Pipe was that the defendants be given notice of all the substantive claims being asserted and the number and generic identities of the potential plaintiffs who participate in a judgment.

The commencement of Mrs. Stull's class action in 1972 set forth the claims and descrived the persons and parameters encompassing the claims therein.

Once a defendant is given notice, it should not matter whether those claims are being asserted (if class status is denied) through intervention or through separate suit. Cf. In Order of R.R. Telegraphers v. Railroad Express Agency, Inc., 321 U.S. 342, 348-9, 64 S.Ct. 582, 586 (1944).

Respondents were at all times informed of the dimensions of the class and petitioner fell squarely within that class. Petitioner's purported class action encompassed the original class described by Mrs. Stull. Under such circumstances, respondents cannot plead surprise and the salutary effects of American Pipe can be achieved if the separate suit is permitted.

II

PETITIONER'S CAUSE OF ACTION DID NOT ACCRUE UNTIL AUGUST 4, 1969 - THE DATE THE CHRIS-CRAFT TENDER OFFER EXPIRED

The Court of Appeals held that the "...federally created right upon which plaintiff bases his claim is the right to full disclosure of accurate information which would have helped him to decide whether to retain his stock or surrender it to the take-over bidder...." It determined that that right was deprived "On July 18, 1969 when the pool of information accessible to Piper shareholders was muddled by Bangor Punta's allegedly misleading prospectus..." (Appendix B, p. 432 of 561 F.2d). Applying New York CPLR § 203(f) and 213(8) to July 18, 1969, it held the suit time barred.

Limiting the deprivation of petitioner's right to July 18, 1969 - the date of the misleading prospectus - is, we

submit, illogical and at odds with the purposes of the Williams Act, 15 U.S.C. § 78(n)(e). The purposes of the Williams Act was to insure that a shareholder of the target company would have all of the information available to enable him to make an informed judgment as to the various alternatives open to him (S. Rep. No. 550 90th Congress, First Session (1967)). Limiting the deprivation solely to the day the misleading prospectus was published gives no effect to the continuing impact the misleading prospectus had. It is not just the first day that the "pool" was muddied that is significant but the fact that the "pool" continued to remain muddied. Indeed, the Pipers communicated on July 25, 1969 with the remaining shareholders, urging acceptance of the Bangor Punta offer of July 18, 1969.

In short, respondents' wrong was in the nature of a continuing one. A

person who is injured by an encroachment has the right to sue for each day that the encroachment remains.

For the purpose of determining when a cause of action accrues for a continuing wrong, it is well settled that the cause of action accrues when the continuing wrong ceases. 54 C.J.S. Limitations of Actions, 8169, p. 127.

See Barninger v. National Maritime Union, 372 F.Supp. 908, 913 (S.D.N.Y. 1974);

Allen v. Payson, 170 Misc. 759, 11 N.Y.S.2d 28, 32;

Instrument Systems Corporation v. Whitman, et al., 77 Misc.2d 719, 354 N.Y.S.2d 514.

At bar, if petitioner sued prior to August 4, 1969 - the date that the Chris-Craft offer expired - that suit would have been dismissed as premature because either petitioner would have still been free up to August 4, 1969 to accept the Chris-Craft offer, or respondents were

free to make complete and truthful disclosure thereby enabling petitioner to accept the Chris-Craft offer. It was not until August 4, 1969 that the cut-off occurred and nothing respondents could do thereafter would enable petitioner to accept the Chris-Craft offer that had already expired.

This Court had previously recognized that the ability of a defendant to correct a violation removes liability from him. See Rondeau v. Mosinee Paper Corporation, 422 U.S. 49, 59, 95 S.Ct. 2069. Until respondents can no longer correct their misrepresentation, we submit that no cause of action can accrue.

The Court of Appeals further held that petitioner might have standing to sue because "[r]egardless of plaintiff's decision concerning tender of his stock, he might well have sustained damage because of the depressing effect which disclosure of the Bangor Punta overvalutation

might have had on the market value of Piper stock..." (Appendix B, p. 433 of 561 F.2d).

The Court of Appeals' ruling imports an unworkable and illogical test to the Williams Act. It equates standing to sue for an injunction (which petitioner had after the first day of the misrepresentation) to the right to sue for damages. The fact that petitioner may have standing to seek injunctive relief does not, we submit, mean that he has immediate standing to seek damages. Indeed, injunctions are granted to prevent irreparable injury, i.e. future damage to a plaintiff. Hence, a potential decline of the market price which would very well be the type of irreparable injury necessary to permit an injunction. However, potential decline of market prices is not "economic loss" which gives a plaintiff standing to sue for damages. To imply that a non-tendering

plaintiff would have the right to sue for the decline in market value of his shares is contrary to the express language of Section 28 of the Securities Exchange Act of 1934 and has been rejected by this Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917. If the Court of Appeals decision is permitted to stand, it would make possible lawsuits for speculative damages and profiteering speculation under the guise of violations of the Williams Act which, we submit, was not the intent of Congress. The importance of this question to the public and bar at large compels, we submit, that this Court entertain jurisdiction by granting Certiorari.

CONCLUSION

For the foregoing reasons, it is submitted that the Writ of Certiorari should issue.

Respectfully submitted,

IRVING BIZAR
Attorney for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

RICHARD J. STULL,

Plaintiff,

-against- 75 Civ. 3782

NICHOLAS H. BAYARD, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - x

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WYATT, District Judge,

This is a motion by plaintiff for an order (a) determining that this action may be maintained as a class action (Fed. R. Civ. P. 23(c)(1)) and (b) granting partial summary judgment in favor of plaintiff (Fed. R. Civ. P. 56), determining that defendants are liable to plaintiff.

There are three cross-motions: (a) by defendants Howard Piper, Thomas F.

Piper, and William T. Piper, Jr.; (b) by defendant Bangor Punta Corporation ("Bangor"); and (c) by defendant The First Boston Corporation ("First Boston"). The cross-motions are for summary judgment in favor of the moving defendants, based on a number of grounds. Because I find that the action is barred by the statute of limitations, the other grounds asserted by movants are not reached.

1.

This action (denominated in the complaint as a "class-action") was commenced on August 1, 1975, and is one of many actions arising out of the battle in 1969 between Bangor and Chris-Craft Industries, Inc. ("Chris-Craft") for control of Piper Aircraft Corporation ("Piper"). As part of their competing efforts to obtain a controlling interest in Piper, Bangor and Chris-Craft each made tender or exchange offers to stockholders of

Piper. The history of the controversy may be found in the opinion of our Court of Appeals in Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (1973).

Plaintiff is Richard Stull, a New York lawyer who has been active in class and derivative actions. He is, and at all relevant times has been, married to Lillian Stull. In 1969 Lillian owned 150 shares and Richard owned 75 shares of Piper. There were 1,644,890 Piper shares outstanding. Richard had advised Lillian to buy her Piper shares (plaintiff deposition 168-9). Neither Richard nor Lillian accepted any tender offer of either Chris-Craft or Bangor for their Piper shares.

2.

Chris-Craft began buying Piper shares in 1968 in the open market. On January 23, 1969, Chris-Craft made a public tender offer for 300,000 Piper shares

at $65 in cash per share.

On February 3, 1969, Lillian, represented by Richard as her attorney, commenced an action in this Court (69 Civ. 440; sometimes referred to hereafter as the "first Lillian action"). There were a number of claims against various defendants, the principal ones being asserted derivatively for the benefit of Piper. The defendants included the three members of the Piper family who are defendants in the case at bar. The gist of the complaint was that defendants had wrongfully adopted a plan to prevent Chris-Craft from securing control of Piper. Yet Lillian averred that the true value of the Piper shares was in excess of $100 per share (and if so the defendants conferred a benefit on Lillian and other stockholders).

On May 12, 1972, Lillian, again represented by Richard as her attorney, commenced another action in this Court

(72 Civ. 2055; sometimes referred to hereafter as "the second Lillian action"). In the second Lillian action, she sought to represent Piper stockholders as a class and to hold defendants liable because by false and misleading statements they induced the class not to consider the $65 per share tender offer of Chris-Craft, which offer was a "fair price" for the Piper shares. (The inconsistency of the claims in the two actions is glaring.)

First Boston was not named as a defendant in either of the two Lillian actions.

There was much activity for several years in the two Lillian actions, with Richard acting as attorney for Lillian. By order filed December 28, 1973, Judge Carter consolidated the two Lillian actions.

Then on April 30, 1974, Judge Owen in the second Lillian action filed

an order with opinion (reported at 63 F.R.D. 702) denying a motion by Lillian that the second Lillian action be maintained as a class action. Judge Owen's reason was that Lillian was not an appropriate representative of the class because (a) her husband Richard was her attorney and there was a "potential conflict of interest" which was "obvious" and (b) her sworn statements in her two actions were so "contradictory" that they made her "vulnerable to enbarrassing cross-examination".

At some point after Judge Owen's decision, Richard seems to have ceased to appear in any papers or proceedings as attorney for Lillian and the firm of Milberg & Weiss appeared as her attorneys. As part of a notice of motion for reargument before Judge Owen, a consent to substitute Milberg & Weiss as attorneys in the two Lillian actions was filed on May

9, 1974. Richard and his law partner arranged for this substitution (plaintiff deposition 80); apparently Lillian had nothing to do with the selection or retainer of Milberg & Weiss.

On March 14, 1975, the two Lillian actions were, as part of a special program in this Court, transferred to me for all purposes.

After a hearing before me on April 25, 1975, of many motions, an order was filed on May 28, 1975. Among other things, this order "deconsolidated and severed" the two Lillian actions and directed "that they be tried separately". The order also recognized a change in the management of Piper, realigned Piper as a party plaintiff in the first Lillian action, permitted it to file an amended complaint in that action against members of the Piper family, and severed the claims of Lillian in that action "from the claims

to be asserted" by Piper.

Thereafter, the parties began discussion of settlement of the two Lillian actions.

3.

The action at bar was commenced by Richard as a class action on August 1, 1975. The claim made here by Richard is substantially the same claim in more or less the same words as that made in the second Lillian action. First Boston was made a defendant in Richard's action; it was not a defendant in the two Lillian actions.

We are told (Memo for Piper family, 8) that before the Richard action was commenced an agreement in principle had been reached settling the two Lillian actions. This does not seem to be disputed.

What legitimate reason there could have been for Richard to commence a third action is difficult to discover.

His own testimony on the subject of deposition was evasive and hard to believe. He testified that he knew of no settlement (SM 84), that he was not informed of the substance of settlement negotiations (SM 86), that he had nothing to do with it (SM 86), that after he was substituted he had nothing to do with Lillian's actions (SM 86-7), that he did not know the status of her actions (SM 86), and that he asked Lillian "to exclude me from any discussions" (SM 86). In an affidavit submitted on these motions, Richard states: "The case was settled over my objections." (Presumably this refers to both the Lillian actions.)

Richard would have us believe that his wife, on whose behalf he had brought the two actions, for whom he had acted as attorney in the two actions for several years, who had bought the Piper shares on his advice, and with whom he was

living in peace and harmony, settled the two actions over his "objections" on the advice of lawyers hand picked by Richard and retained for her by him. I cannot stretch credulity so far.

If Richard really objected to a settlement by Lillian, she and her lawyers (hand picked by Richard) could readily have been persuaded to refuse the settlement. If, for some bizarre reason not now to be seen, persuasion did not succeed, Richard could have asked to intervene in the two Lillian actions. Moreover, in the derivative action (the first Lillian action) the settlement required the approval of the Court. Richard could have asked the Court to disapprove the settlement. Any of these courses would have avoided the statute of limitations problem, which at that late date was certainly an obvious one. But Richard followed none of the logical courses. Instead, he commenced

this third action. His reasoning must have been that he and Lillian would enjoy the benefits of the settlement of her actions, while preserving the change of future benefits through prosecution of his third action.

4.

Despite the commencement of the Richard action, defendants went ahead to complete settlement of the two Lillian actions. This seems understandable from their point of view since it would be an advantage to them to eliminate the two Lillian actions against which the statute of limitations could not be urged, even though a third action remained but one against which the statute of limitations would be available.

The first Lillian action, being a derivative action, required Court approval of a settlement. Fed. R. Civ. P. 23.1 A stipulation of settlement was filed which

referred to the fact that Piper itself had commenced, in the Court of Common Pleas for Clinton County, Pennsylvania, an action against the Piper family members. Settlement of the first Lillian action was agreed not to affect the rights of Piper in its Pennsylvania action. Neither Lillian nor Piper were to obtain anything from any defendant but Bangor agreed to pay $1249.99 for costs and disbursements incurred by Richard's law firm and Milberg & Weiss in the action. An order was filed on February 11, 1976, directing that notice of the settlement be given by mail to all Piper stockholders and of a hearing on the settlement to be held on March 26, 1976. Such hearing was held. No stockholder - notably including Richard - opposed. The settlement was approved and the action dismissed by order filed March 26, 1976.

Since Judge Owen had denied class action status to the second Lillian

action, no Court approval for the settlement of this action was required. What benefits Lillian received by way of settlement are not shown and are not required to be shown. A stipulation of dismissal of the second Lillian action was submitted, "So ordered", and filed on March 16, 1976.

5.

This brings us finally to the application of the statute of limitations to the third action, that by Richard.

It is averred in the complaint that the defendants made untrue statements of material facts and omitted to state other material facts which were necessary to make their statements not misleading, and that they engaged in fraudulent, deceptive and manipulative acts and practices in violation of Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. § 78n; "the 1934 Act"). The various mis-

leading statements and omissions occurred in several letters directed to Piper stockholders from members of the Piper family in January and June of 1969, a press release on May 8, 1969, and the registration statement of Bangor on July 18, 1969.

There is also an averment that the public announcement by the defendants in May of 1969 of Bangor's exchange offer was "illegally made and disseminated" (apparently claimed to be in violation of Section 14(d)(1) of the 1934 Act; 15 U.S.C. § 78n(d)(1)), because the announcement was made at a time when no registration statement concerning the offer had been filed with the Securities and Exchange Commission. Since plaintiff seeks relief only for damages suffered because of his failure to accept the Chris-Craft offer, and makes no claim that he bought, sold, or even considered accepting Bangor's exchange offer, this averment can only be construed

as charging another misleading omission under Section 14(e) of the 1934 Act.

Finally, it is averred that the defendants "wrongfully and unlawfully negotiated and acquired" for Bangor during the pendency of Bangor's exchange offer, blocks of Piper shares at private sale. How this activity violated Sections 14(d)(1) or 14(e) of the 1934 Act is not understood, but it appears that in any event all such acquisitions by Bangor occurred between May 14 and May 23, 1969. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d at 377

It is thus clear that all of the allegedly unlawful acts of the defendants were averred as having been committed between January 26, 1969 and July 18, 1969.

6.

The principle is established that when a federally created right of action has no accompanying statute of

limitations, the local law of limitations is applicable. Ernst & Ernst v. Hochfelder, ___ U.S. ___ (March 30, 1976; slip opinion, p.23, fn. 29); Klein v. Bowers, 421 F.2d 338, 343 (2d Cir. 1970)

The relevant New York statutes are CPLR §§ 213(9) and 203(f). When read together, these statutes provide that, in actions based on fraud, suit must be commenced either within six years of the time the fraud is committed, or within two years of the time the fraud is, or should have been, discovered by the plaintiff, whichever period is longer. Rutland House Associates v. Danoff, 37 A.D.2d 828, 325 N.Y.S.2d 273 (1st Dept., 1971)

7.

It is clear that in the present case, the last fraudulent act of which plaintiff complains occurred on July 18, 1969. This action was not filed until August 1, 1975, more than six years later.

The plaintiff, by his own admission, discovered the alleged violations of Section 14 of the 1934 Act by defendants no later than December 10, 1971, the date of Judge Pollack's decision in Chris-Craft Industries, Inc. v. Piper Aircraft, 337 F.Supp. 1128. See deposition of plaintiff pp. 61-66 Clearly, the action was commenced more than two years after discovery by plaintiff of the fraud.

8.

To avoid the conclusion just reached, plaintiff argues that commencement as a class action of the second Lillian action tolled the running of the statute of limitations, at least during the period before Judge Owen ordered that the second Lillian action could not be maintained as a class action. This argument is based on the opinion in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

In American Pipe, the District Court denied leave to intervene under Fed. R. Civ. P. 24(b)(2) to members of a purported class after class action status had been denied to the action and after the relevant limitations period had run on the claims of the applicants to intervene; the District Court held that the statute of limitations had not been tolled by commencement of the class action on their behalf. 50 F.R.D. 99 The Court of Appeals reversed, finding that the statute had been tolled as to the applicants to intervene; it did not direct the District Court to grant their motion to intervene but remanded for an exercise of discretion under Fed. R. Civ. P. 24(b) as to their motion to intervene. 473 F.2d 580 The Supreme Court then affirmed, saying (among other things):

> "We hold that in this posture, at least where class action has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder

> of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." (414 U.S. at 553; emphasis supplied)

The Supreme Court went out of its way to specify that the limitations statute was tolled by a class action only as to those "purported members of the class who make timely motions to intervene after the court has found the suit appropriate for class action status".

Richard is not within the American Pipe principle of tolling. He did not move (timely or not) to intervene in the then pending second Lillian action after class action status had been denied to that action. Richard went counter to and defied the American Pipe principle by commencing a separate and independent action, thus increasing the volume of federal

litigation and defeating the economy and efficiency which it was the object of the present class action Rule 23 to bring about.

There is no square authority on the point, but in my view a member of a class, on whose behalf a class action has been commenced, may not bring a separate, independent action after his individual claim has been time barred. His sole remedy, under American Pipe, is a timely motion to intervene in the class action after class action status has been denied; only if he does so, is the statute of limitations tolled as to him.

The discussion in American Pipe centered on the nature and objectives of class actions. The opinion began: "This case involves an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal

courts." The opinion relied on rulings under Fed. R. Civ. P. 23 as it stood before the 1966 amendments that intervention by a class member was proper even though his claim was time barred (Escott v. Barchris Construction Corp., 340 F.2d 731 (2d Cir. 1965) was one of these.) The opinion stated: "Thus, the commencement of the [class] action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the [class] suit as well as for the named plaintiffs" (414 U.S. at 551; emphasis supplied). The opinion states: ". . . the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment" (414 U.S. at 552; emphasis supplied). There is nowhere in the opinion any suggestion that a separate independent action by a class member could be maintained. The opinion emphasized

that its interpretation of the class action Rule 23 was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve" (414 U.S. at 556). It certainly would not effectuate "litigative efficiency and economy" to permit any number of separate, independent actions by class members on time-barred claims. The separate opinion of Mr. Justice Blackmun points out that the American Pipe principle will not unduly encourage the assertion of stale claims because these can only be asserted through intervention either as of right or as an exercise of the Court's discretion and that the American Pipe decision does not "necessarily guarantee intervention for all members of the purported class" (414 U.S. at 561; emphasis supplied).

The conclusion in the Moore treatise from a study of American Pipe is

this: "On balance, then, it seems likely that the class member may not file an independent suit after the claim is time-barred". 3B Moore's Federal Practice 1975 Supplement p.155

There is a puzzling footnote 13 in the opinion of Mr. Justice Powell in Eisen v. Carlisle, 417 U.S. 156, at 176 (1974). This might suggest a broader reading of the effect of American Pipe than mine.

I have examined the cases cited for Richard. They do not affect my conclusion and not all of them need be mentioned. Hellerstein v. Mather, 360 F. Supp. 473 (D. Col. 1973) without discussion reaches a conclusion contrary to mine but this was before the Supreme Court decided American Pipe. Miller v. Central Chinchila Group, Inc., [1974-1975 Transfer Binder] CCH Sec. Law X. ¶ 95,077 (S.D. Iowa 1975) seems to read American Pipe as

I do because in denying class action status the Court ordered notice thereof to all members of the class with further notice that they had 30 days within which to move to intervene.

The several cross-motions by defendants are granted. The motion by plaintiff is denied as moot.

Settle Order.

Dated: New York, New York
January 7, 1977

INZER B. WYATT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 1241 September Term, 1976

(Argued May 27, 1977 Decided August 26, 1977)

Docket No. 77-7088

RICHARD J. STULL,

Plaintiff-Appellant,

v.

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually and as EXECUTORS OF THE ESTATE OF WILLIAM T. PIPER, Deceased, NICOLAS M. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

Before: VAN GRAAFEILAND, Circuit Judge, MEHRTENS* and PIERCE,** District Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Wyatt, J.,

dismissing plaintiff's claim under Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) as barred by the statute of limitations.

Affirmed.

IRVING BIZAR, New York, N. Y. (Demov, Morris, Levin & Shein, N.Y., N.Y. Martin Rosengarten, of counsel), for Appellant.

JAMES V. RYAN, New York, N. Y. (Rogers & Wells, N.Y., N. Y., of counsel), for Defendant-Appellee Bangor Punta Corporation.

PAUL G. PENNOYER, JR., New York, N.Y. (Chadbourne, Parke, Whiteside & Wolff, N.Y., N.Y., of counsel), for Defendants-Appellees Howard Piper, Thomas F. Piper, William T. Piper, Jr.

CHARLES W. SULLIVAN, New York, N.Y. (Sullivan & Cromwell, N.Y., N.Y., of counsel), for Defendant-Appellee The First Boston Corporation.

* Of the Southern District of Florida, sitting by designation.

** Of the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, Circuit Judge:

This action arises out of the unsuccessful attempt of Chris-Craft Industries (Chris-Craft) to acquire control of Piper Aircraft Corporation (Piper).[1] Plaintiff, a Piper shareholder, brought suit under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), alleging that he and other members of a putative class were induced not to exchange their Piper shares for Chris-Craft stock and cash because of fraudulent misstatements and omissions by defendants. The District Court granted defendants' motion for summary judgment on the ground that plaintiff's claim was barred by the statute of limitations. We affirm.

During 1969, Chris-Craft and Bangor Punta Corporation (Bangor Punta) were engaged in a battle for control of Piper. To induce Piper shareholders to surrender their stock, Chris-Craft made a

number of cash tender and stock exchange offers, the last of which expired on August 4, 1969. On July 18, 1969, Bangor Punta filed a prospectus and extended a competing exchange offer. On August 1, 1975, plaintiff commenced this suit against Bangor Punta and The First Boston Corporation, an investment adviser and underwriter, and named as additional defendants certain officers of these corporations and of Piper. His theory of action was that a series of misstatements and omissions by defendants between January and mid-July 1969 induced a number of Piper shareholders not to accept Chris-Craft's final exchange offer. The last wrongful act alleged in the complaint was the overevaluation of an asset in the July 18 Bangor Punta prospectus.

The trial court held that plaintiff's action was governed by a six-year statute of limitation which ran from the

last fraudulent act committed by defendants.[2] Because this had occurred on July 18, 1969 and plaintiff did not sue until August 1, 1975, the court found his action to be time-barred. This appeal followed.

Section 14 of the Securities Exchange Act of 1934 prescribes no period of limitation for actions brought thereunder. In such a situation, federal courts apply those statutes of limitation of the forum state which best effectuate the policies underlying the federal statute. Arneil v. Ramsey, 550 F.2d 774, 779 (2d Cir. 1977). In actions alleging fraudulent violations of the federal securities law, this court has consistently adopted state statutes of limitation for actions based upon common law fraud. See, e.g., Klein v. Shields & Co., 470 F.2d 1344, 1346 (2d Cir. 1972); Klein v. Auchincloss, Parker & Redpath, 436 F.2d 339, 341 (2d Cir. 1971); Hoff Research & Development

Laboratories, Inc. v. Philippine National Bank, 426 F.2d 1023 (2d Cir. 1970).[3] We look to federal law, however, to determine when the limitation period starts to run. Arneil v. Ramsey, supra, 550 F.2d at 780. Under federal law, the statute commences to run when the plaintiff has actual knowledge of the alleged fraud or knowledge of facts which in the exercise of reasonable diligence should have led to actual knowledge. Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410 (2d Cir. 1975); Klein v. Shields & Co., supra, 470 F.2d at 1346-47; Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 8-9 (5th Cir. 1967).

The New York statute of limitations most closely analogous to this federal rule, C.P.L.R. § 203(f), provides in part:

> ... [W]here the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reason-

> able diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery... .

Because it is undisputed thwt plaintiff had actual knowledge of defendants' alleged violations of § 14 no later than May 10, 1971, this provision, standing alone, would be a clear bar to the present action. Rickel v. Levy, 370 F.Supp. 751, 756-57 (E.D.N.Y. 1974).

However, C.P.L.R. § 203(f), read in conjunction with C.P.L.R. - 213, also permits an action based upon fraud to be brought within six years "from the time the cause of action accrued" if this is longer than the two-year period above provided for. "The result, in an actual fraud suit, is two separately-timed and alternative limitations periods in the case of a delayed discovery: six years from accrual or two years from discovery, whichever is longer." Hoff Research &

Development Laboratories, Inc. v. Philippine National Bank, supra, 426 F.2d at 1026 (footnote omitted).

The alternative six-year period is not measured from the date of the defendant's last fraudulent act, but from when the plaintiff suffers a loss as a result thereof, Sack v. Low, 478 F.2d 360, 365-66 (2d Cir. 1973); i.e., when a plaintiff with assumed knowledge of the fraudulent wrong may assert a claim for relief. Barninger v. National Maritime Union, 372 F.Supp. 908, 913 (S.D.N.Y. 1974); Practice Commentary C203:12 7B McKinney's Consolidated Laws 125-127 (1976). In the instant case, the District Court correctly held that this right accrued promptly following defendants' fraudulent conduct.

The federally created right upon which plaintiff bases his claim is the right to full disclosure of accurate information which would have helped him to

decide whether to retain his stock or surrender it to the take-over bidder. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). Appellant was deprived of this right on July 18, 1969, when the pool of information accessible to Piper shareholders was muddied by Bangor Punta's allegedly misleading prospectus. Although § 14(e) does not specifically provide plaintiff a cause of action for this deprivation, such a right to sue has generally been inferred. See, e.g., H. K. Porter Co. v. Nicholson File Co., 482 F.2d 421, 424 (1st Cir. 1973). Moreover, it has been extended to both tendering and non-tendering shareholders. Smallwood v. Pearl Brewing Co., 489 F.2d 937, 947 (2d Cir. 1969). Whatever uncertainty may attach to these holdings as a result of the Supreme Court's caveat in Piper v. Chris-Craft Industries, Inc., 45 U.S.L.W. 4182, 4193 n.28 (U.S. Feb. 23, 1977) need not concern us here. Assuming

that plaintiff had a right to sue and, in addition, had immediate knowledge of defendants' misrepresentations as contemplated by New York's six year statute of limitation, his right to seek legal relief accrued when the misrepresentations were made. He was not precluded from suit, as he now contends, until Chris-Craft's tender offer expired unaccepted on August 4, 1969.[4] Regardless of plaintiff's decision concerning tender of his stock, he might well have sustained damage because of the depressing effect which disclosure of the Bangor Punta overevaluation might have had on the market value of Piper stock. See Electronic Specialty Co. v. International Controls Corp., supra, 409 F.2d at 946; cf. Dann v. Studebaker-Packard Corp., 288 F.2d 201, 209 (6th Cir. 1961). Because plaintiff, with the knowledge presumed by New York's six year statute, did have a claim which he could promptly pursue, the

District Court correctly rejected his contention that his cause of action did not accrue until Chris-Craft's tender offer expired on August 4, 1969.

Relying upon American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), appellant argues that the six year statute limitation was tolled for a two year period during which a related class action was pending. In 1972, appellant's wife, with appellant acting as her attorney, commenced a class action on a complaint almost identical to the one herein. On April 30, 1974, the District Court refused to certify a class in that action, see Stull v. Pool, 63 F.R.D. 702 (S.D.N.Y. 1974), and thereafter the case was settled. Appellant now contends that the statute of limitations was tolled from 1972 until 1974 when class action status was denied.

In American Pipe, the Supreme Court held that

> at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. 414 U.S. at 552-53.

Appellant's argument that this reprieve should be extended to class members who file separate suits after the class action has been terminated and the statute of limitation has expired is completely without merit. "[T]he rule of American Pipe was intended for the benefit of purported members of the class who sought to intervene in the action after class status was denied." Arneil v. Ramsey, supra, 550 F.2d at 783.

Affirmed.

FOOTNOTES

1. The story of the attempted takeover is told in Piper v. Chris-Craft Industries, Inc., 45 U.S.L.W. 4182 (U.S. Feb. 23, 1977). The history of the instant litigation is in the District Court's opinion reported at 424 F.Supp. 937 (S.D.N.Y. 1977).

2. Although there is substantial support among legal commentators for an outside cut-off period of limitation which starts to run on the date of the last act constituting the violation, see, e.g., A.L.I. Fed. Sec. Code §§ 1422(b), (d) (Tent. Drafts Nos. 1-3, 1974); Martin, Statutes of Limitation in 10b-5 Actions, 29 Bus. Law. 443, 454-57 (1974); Bateman & Keith, Statutes of Limitations Applicable to Private Actions Under SEC Rule 10b-5: Complexity in Need of Reform, 39 Mo. L. Rev. 165, 178-80 (1974), we do not read the District Court's opinion as a

literal adoption of this proposal.

3. Limitation periods contained in state Blue Sky laws have been utilized by other circuits in a number of Rule 10b-5 cases. See, e.g., LaRosa Building Corp. v. Equitable Life Assurance Society, 542 F.2d 990 (7th Cir. 1976); Newman v. Prior, 518 F.2d 97 (4th Cir. 1975); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972).

4. Assuming that plaintiff acquired knowledge of defendants' misrepresentations, he might have endangered his right of recovery if he sat idle until the Chris-Craft tender offer expired and avoidable damages accrued. "The purpose of the Securities Exchange Act is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act." Royal Air Properties, Inc. v. Smith, 312 F.2d

211, 213-14 (9th Cir. 1962); see also Hughes v. Dempsey Tegeler & Co., 534 F.2d 156, 175 (9th Cir.), cert. denied, 45 U.S.L.W. 3306 (Oct. 19, 1976); Pearlstein v. Scudder & German, 527 F.2d 1141, 1145-46 (2d Cir. 1975); Lowenschuss v. Kane, 520 F.2d 255, 269 (2d Cir. 1975).

Stull v. Bayard, et al.

I concur

/s/ W. O. Mehrtens

Aug. 22, 1977

Stull v. Bayard, et al.

I concur

MP

8/11/77

APPENDIX C

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of

the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any

questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the

commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action main-

tained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule

applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed

accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

CPLR § 203

LIMITATIONS OF TIME

(f) Time computed from actual or imputed discovery of facts. Except as provided in article 2 of the uniform commercial code or in section two hundred fourteen-a of this chapter, where the time within which an action must be commenced

is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

CPLR § 213(8)

LIMITATIONS OF TIME

8. an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it.

15 U.S.C. § 78(n)(e)
(THE WILLIAMS ACT)

Sec. 14(e) It shall be unlawful for

any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-738

RICHARD J. STULL,

Petitioner,

against

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually and as Executors of the Estate of WILLIAM T. PIPER, Deceased, NICOLAS M. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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December 21, 1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-738

RICHARD J. STULL,

Petitioner,

against

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually and as Executors of the Estate of WILLIAM T. PIPER, Deceased, NICHOLAS M. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted jointly on behalf of the Respondents Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation ("Bangor Punta") and The First Boston Corporation ("First Boston") in opposition to the petition for a writ of certiorari.[1]

[1] These Respondents were the only parties served with process by Petitioner.

Statement of the Case

This purported class action arose out of the contest for control of Piper Aircraft Corporation ("Piper") which took place over eight years ago between Bangor Punta and Chris-Craft Industries, Inc. ("Chris-Craft"), which was the subject of a recent decision of this Court, *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977).

Petitioner, a Piper shareholder, did not tender his shares to either contestant and, on August 1, 1975, filed this action which seeks recovery on the theory that Respondents fraudulently dissuaded him and the class he purports to represent from accepting the exchange offer made by Chris-Craft in July 1969.

This is the third action concerning the Piper control contest brought by Petitioner as attorney for his wife Lillian Stull ("Lillian"), or as plaintiff. The history of this action and the two related actions prosecuted by Petitioner on behalf of Lillian is set forth in detail in the opinion of the district court. 424 F. Supp. 937-41 (App. A1-16).[2]

In summary, Petitioner commenced in February 1969 a derivative action on behalf of Piper with Lillian as the representative entitled *Stull* v. *Greene,* 69 Civ. 440 (S.D.N.Y.), which alleged that a cash tender offer made by Chris-Craft for 300,000 Piper shares at $65 per share was a "self-dealing operation" to acquire Piper shares "for less than fair value." Between 1969 and 1972, Petitioner filed no less than four amended complaints in *Stull* v. *Greene* alleging that Chris-Craft's tender and exchange offers to Piper shareholders were "grossly and unconscionably inadequate."

[2] References to the Appendices in the Petition will be cited in this manner.

In May 1972 Petitioner filed a class action with Lillian as the representative entitled *Stull* v. *Pool,* 72 Civ. 2055 (S.D.N.Y.). Contrary to the allegations in *Stull* v. *Greene,* Lillian claimed injury on the basis that the alleged class of non-tendering Piper shareholders was dissuaded from accepting the allegedly advantageous Chris-Craft exchange offer—the same offer Petitioner claimed was "grossly and unconscionably inadequate" in *Stull* v. *Greene.*

In April 1974, a motion to certify class status in *Stull* v. *Pool* was denied on the grounds that Lillian was not qualified to represent the proposed class because of her prior contradictory statements in *Stull* v. *Greene* and her potential conflict of interest resulting from Petitioner's financial interest in the action as attorney for the class.[3] The appeal from denial of class status was dismissed on October 8, 1974, and afterwards both *Stull* v. *Greene* and *Stull* v. *Pool* were settled by Lillian. (App. A9-12)

Although Petitioner was fully cognizant of the proceedings in his wife's action, he made no effort to intervene after class status was denied. Instead, on August 1, 1975, more than fifteen months after denial of class status in *Stull* v. *Pool* and more than six years after July 18, 1969 when the last alleged fraudulent act was committed by Respondents, Petitioner filed the instant action which is virtually identical to the class action he commenced as attorney on behalf of Lillian. Petitioner gives no legitimate reason, nor could there be one, for his not seeking to intervene as a party plaintiff in *Stull* v. *Pool.* (App. A11-12)

Petitioner moved to certify the class and also for partial summary judgment. Respondents cross-moved for summary judgment on several grounds and opposed the motion to certify the class. The district court dismissed the action and held that it was barred by the applicable New York

[3] *Stull* v. *Pool,* 63 F.R.D. 702, 704-05 (S.D.N.Y. 1974).

statute of limitations. 424 F. Supp. 937. The Court of Appeals for the Second Circuit unanimously affirmed. 561 F.2d 429.

Argument

The questions raised by the Petition are of limited interest and do not warrant review by this Court. The decision below is not in conflict with decisions of this Court or other courts of appeals, nor does this case involve an important undecided issue involving the administration of justice in the federal courts. The determination that Petitioner's action was barred by the New York statute of limitations involves the application of state law by a federal court. The question of whether the tolling rule in *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), was applicable to this action, and, if applicable, was properly applied to the peculiar facts here presented, is of no significance beyond this case.

POINT I

Petitioner's action was time barred under New York law.

Petitioner concedes that the New York statute of limitations applied to this action. Although there were no cases directly in point, the courts below interpreted New York law and held that under the applicable state law provisions, New York CPLR § 203(f) and § 213(8), Petitioner's action was time barred because it was filed more than six years after Petitioner's cause of action accrued.[4] (App. A14-18; B5-11)

[4] *McConkey Realty Corp.* v. *Wildermuth,* 214 App. Div. 395, 397, 212 N.Y.S. 216, 217 (4th Dep't 1925); *Rickel* v. *Levy,* 370 F. Supp. 751, 755-56 (E.D.N.Y. 1974). *See Northrup* v. *Hill,* 57 N.Y. 351, 353-354 (1874); Practice Commentary C203:12, 7B *McKinney's Cons. Laws* 125, 127 (1976).

Petitioner asserts in substance that the courts below erred in determining when the cause of action accrued for purposes of applying the New York statute. Even if the argument had merit, which it does not, such an issue is not worthy of review by this Court.

POINT II

Petitioner failed to intervene in *Stull* v. *Pool* before the statute of limitations expired.

Petitioner argues that under the principles announced in *American Pipe* v. *Utah,* 414 U.S. 538 (1974), his class action, filed more than six years after the cause of action accrued, was not time barred.[5] Petitioner contends that the commencement of *Stull* v. *Pool* in May 1972 tolled the statute of limitations until April 1974 when class status was denied.

Class status was denied in *Stull* v. *Pool* solely on the ground that Lillian was not a proper representative of the purported class. Petitioner had actual notice that class status was denied and could have moved promptly to intervene. Indeed, at the time class status was denied, fifteen months remained before the six year statute of limitations expired as to Petitioner's claim. Yet, for his own inexplicable reasons, Petitioner waited until after the limitations period expired and then commenced another *class* action.

The considerations involved in tolling the statute of limitations where class status is denied on the ground of disqualification of the class representative have not been specifically addressed by this Court or the lower courts.[6]

[5] First Boston was not a party in *Stull* v. *Pool* and therefore Petitioner has no tolling argument as to it. *Arneil* v. *Ramsey,* 550 F.2d 774, 782 n.10 (2d Cir. 1977).

[6] This Court has discussed the principle of tolling in cases where class status was denied for lack of numerosity, *e.g., American Pipe,*

(footnote continued on following page)

However, in *American Pipe, supra,* this Court, recognizing that tolling is contrary to the general policy of ending litigation of stale claims and that Rule 23 of the Federal Rules of Civil Procedure was intended to limit the proliferation of actions, held that where class status was denied because of lack of numerosity, those members of the purported class who promptly moved to intervene in the existing action would receive the benefit of tolling (414 U.S. at 552-556). The courts below, with these same policy considerations present and in a situation where class action treatment might be appropriate, held that Petitioner should have intervened in *Stull* v. *Pool* when his wife was found to be disqualified and that by failing to do so, the benefits of tolling were not available to him as a potential class representative.

By requiring that a proposed new class representative intervene in the pending action, the district court through its discretionary powers under Rule 24(b) can assure that the continuance of the class action is consistent with the objectives of Rule 23 and the administration of justice.[7] However, if intervention were not required, there would be no effective limitations period since another Piper shareholder could commence still another class action if Petitioner were found not qualified to represent the class. Such a procedure would also result in a proliferation of class actions contrary to the primary object of Rule 23.

(footnote continued from preceding page)

supra; and *United Airlines, Inc.* v. *McDonald,* —— U.S. ——, 97 S.Ct. 2464, 2474 (1977); and where class status is granted and a member requests exclusion from the class, *e.g., Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 176 n.13 (1974).

[7] *See Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Co. of Texas,* 511 F.2d 1073, 1078-80 (10th Cir. 1975); *Miller* v. *Central Chinchilla Group, Inc.,* 66 F.R.D. 411, 416-17 (S.D. Iowa 1975); *Goldstein* v. *Regal Crest, Inc.,* 62 F.R.D. 571, 578-580 (E.D. Pa. 1974); 3B *Moore's Federal Practice* ¶ 23.90, p. 23-1653 n.11 (1976-77 Supplement).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 21, 1977.

Respectfully submitted,

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Affidavit of Service

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

REX W. MIXON, JR., being duly sworn, deposes and says that, pursuant to Rule 33 of the Supreme Court Rules, he served the foregoing Joint Brief upon counsel of record for Petitioner by mailing on December 21, 1977, three true and correct copies thereof, first class mail postage prepaid, to Irving Bizar, Esq., 40 West 57 Street, New York, New York 10019.

Rex W. Mixon, Jr.

Sworn to before me this
21st day of December, 1977.

.....
Notary Public

Supreme Court, U. S.
FILED
DEC 28 1977
MICHAEL RODAK, JR., CLERK

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PETITIONER'S REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION

Petitioner submits this reply brief to correct a major misstatement and distortion of the Record.

1. At the outset, this Court should note that respondents do not challenge any of the arguments petitioner has advanced with respect to his contention that the cause of action did not accrue until August 4, 1969.

Respondents' argument that petitioner is time barred under New York law is thus irrelevant.

Moreover, Petitioner contends that the applicable New York statute of limitation was tolled under the doctrine of American Pipe & Construction Co. v. Utah, 414 U.S. 538. Under the Supremacy Clause of the United States Constitution, state law must yield in this case.

2. Respondents erroneously argue that "[p]etitioner had actual notice that class status was denied and could have moved promptly to intervene..." (R. B., Page

5)* The argument is both factually and legally incorrect.

Petitioner had no hearing below; the motion was decided on affidavits alone. Petitioner contended below that he had no notice. When class status was initially denied for Lillian Stull, petitioner withdrew as counsel and new counsel was substituted in his place. New counsel then promptly renewed the motion for class determination and appealed from the original denial of class status. Petitioner took no part in the further litigation that ensued. He did not know of the withdrawal of the renewal of class motion nor of the dismissal of the appeal. His first notice** as

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* "R. B." refers to respondents' brief.

** No notice was directed to be sent to the putative class members when Lillian's attempt to renew the motion for class determination was withdrawn.

to disposition was the attempt by respondents during settlement negotiations and discussions before the Magistrate to whom the matter had been assigned to have him sign a release. At that time he refused and indicated that he would start a class action, which he promptly did - prior to the settlement of Lillian's action. Respondents did not dispute this below nor do they do so now. In the absence of an evidentiary hearing, these facts must be accepted as true.

Nothing in American Pipe & Construction Co. v. Utah, supra, suggests that to obtain the benefit of the tolling doctrine enunciated therein, one must intervene promptly. Indeed, in United Airlines, Inc. v. McDonald, ___ U.S. ___, 97 S.Ct. 2464 (1977), this Court permitted intervention after final judgment in a litigation pending for five years in order to prosecute

an appeal from an initial denial of class determination. This Court recognized that "prompt" intervention for the purpose of pressing class questions was not a requirement of American Pipe.

Furthermore, respondents' argument makes no logical sense. If the tolling doctrine of American Pipe applies, then the New York statute of limitation must have been deemed to stop running for approximately twenty-three months. The New York statute began to run again after denial of class in Lillian's action, and petitioner must be given "credit" for the twenty-three months. If that be so, then it did not matter when in the succeeding twenty-three months he commenced his action; his suit was timely because of the aforesaid tolling for twenty-three months.

Conclusion

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: December 27, 1977.

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